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ABSTRACT

Without question, Supreme Court decisions regarding public school student rights have greatly affected school policies. This paper reviews three decisions of the United States Supreme Court that currently classify the public school student's free-speech and expression rights. The cases include "Tinker v. Des Moines Independent Community School District" (1969), "Bethel School District v. Fraser" (1986), and "Hazelwood School District v. Kuhlmeier" (1988). The paper examines the ideas underlying the educational policies illustrated by the three decisions and evaluates whether these policies are compatible with the aims of public education. It is argued that each of the three decisions enunciate fundamentally different notions about the ends and means of public education, which may be a source of controversy over policy decisions at the school level. In formulating school policy, the scope of inquiry needs to include an appraisal of the appropriate roles for students and educators. These roles must be educationally sound and consistent with the spirit of the constitutional methods that schools should be using to educate. (Contains 21 references.) (LMI)

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TINKER, FRASER AND *HAZELWOOD*: WHICH EDUCATIONAL POLICIES ARE TRULY "EDUCATIONAL"?

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ABSTRACT

This paper reviews three decisions of the United States Supreme Court which currently classify the public school student's free speech and expression rights. In order of time, the cases are as follows: *Tinker v. Des Moines Independent Community School District* (1969), *Bethel School District v. Fraser* (1986), and *Hazelwood School District v. Kuhlmeier* (1988). The paper examines the ideas underlying the educational policies which the above decisions illustrate. It also evaluates whether these policies are compatible with the aims of public education. The author's thesis is that each of the three decisions enunciate fundamentally different notions about the ends and means of public education and this may be a source of controversy over policy decisions at the school level. The paper concludes that in formulating school policy the scope of inquiry needs to include an appraisal of the student and educator proper roles. These roles have to be educationally sound and be in line with the spirit of the constitutional methods that schools should be using to educate.

TINKER, FRASER AND *HAZELWOOD*: WHICH EDUCATIONAL POLICIES ARE TRULY "EDUCATIONAL"?

INTRODUCTION

Without question, Supreme Court decisions concerning public school student rights have greatly affected school policies. But do these decisions affect school policy just by drawing the line between the student rights, which the Constitution protects and those that it does not? A study of the Court's rulings reveals that the Justices not only define the meaning of the Constitution in the school context, but they often introduce their own views concerning pertinent educational policy -- e.g., the lessons that schools must teach, and how schools should function to teach these lessons in the most effective ways.

This paper reviews three decisions of the United States Supreme Court that currently classify the public school student's free speech and expression rights. In chronological order, the cases are as follows: *Tinker v. Des Moines Independent Community School District* (1969) (*Tinker*), *Bethel School District v. Fraser* (1986) (*Fraser*), and *Hazelwood School District v. Kuhlmeier* (1988) (*Hazelwood*). The paper examines the ideas underlying the educational policies that the above decisions illustrate. It also evaluates whether these policies are compatible with the aims of public education -- one such being the preparation of intelligent and responsible members of the democratic society. The paper's thesis is that each of these three decisions enunciates fundamentally different notions about the ends and means of public education, and this may be a source of controversy over policy decisions at the school level. The paper concludes that in formulating school policy the scope of inquiry needs to include an appraisal of the appropriate roles of students and educators. These roles have to be educationally sound and in line with the spirit of the constitutional methods that schools should be using to educate.

I

In *Tinker*, *Fraser*, and *Hazelwood* the Justices established the meaning of the First Amendment's free speech clause in schools by respectively deciding: (1) "Speech or expression which is entirely divorced from actually or potentially disruptive conduct by those participating in it is entitled to comprehensive protection under the First Amendment" (393 U.S., at 505-506). (2) "[T]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school's basic educational mission" (478 U.S., at 685). (3) "[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of

student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns" (484 U.S., at 273). To arrive at its conclusions, in each case the Court specified the role of the states in their capacity to educate for citizenship and social roles, and the legitimate means to attain these ends.

Relevant to these issues, about the means that the states could use to educate, were the Constitutional limits on the authority of public school officials to oversee student activities. In discussing these limits, the Justices also referred to the lessons that the public school must teach and to the proper roles of students and teachers. Therefore, besides establishing the meaning of the First Amendment in each of these cases, the Court also expressed several of its views on educational policy, e.g., what schools ought to teach and how educators can teach it best.

In *Tinker* the Court focused on the right of public school students to express views and ideas through symbolic acts. The case concerned three public school students who exercised their right to what the Justices called "pure speech." Following the tactic of a group of adults to protest the Government's policy in Vietnam, the students planned to wear black armbands for certain days while at school. The principals of the school district became aware of this plan and two days before the student protest they met and adopted a policy that stated: any student wearing an armband at school would be asked to remove it, and if he refused he would be suspended until he returned without the armband. All students were informed about the new policy but the three students wore their armbands as originally planned. On defying the order of school authorities to remove the armbands, the students were sent home, and suspended subject to their compliance to school policy. The Court found that there was no evidence that the students' act caused any disorder or disturbance upon the work of the school or the rights of the other students.

In its opinion the Court maintained that the principal use to which the schools are dedicated is to accommodate students during prescribed hours for certain types of activities. Those activities are to include personal intercommunication among the students. The majority argued that this is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. Whether in the cafeteria, or on the playing field, or on the campus -- during authorized hours -- the student may express his or her opinions, even on controversial subjects like the conflict in

Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others (393 U.S., at 512-513).

In 1986, seventeen years after the *Tinker* ruling, the *Fraser* Court discussed the right of public school students to speech that involves obscene language or speech that school officials may evaluate as offensive to others. The episode that led to the controversy took place during school hours at a voluntary school assembly. As part of a school-sponsored program in self-government, a high school student delivered a speech in which he nominated his fellow student for a student elective office. The speech was delivered before approximately 600 students and it involved sexual innuendo. During the speech some students hooted and yelled while others were embarrassed. School officials found the speech to be a violation of the school's "disruptive conduct rule" and they disciplined the student who delivered it.

The Court's decision in *Fraser* did not overrule its earlier in *Tinker*. However, the *Fraser* Court found that the process of educating the youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. The Justices argued that the undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. The role and purpose of the American public school system, stated the majority in its opinion, were well described by two historians, who stated: "[Public] education must prepare pupils for citizenship in the Republic . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation" (478 U.S., at 681).

Finally, in 1988 the *Hazelwood* Court addressed the question of whether school officials, while performing their educational duties, have the right to censor student speech and expression that occur during a school-sponsored activity. The incident involved the deletion by a public school principal of articles that students had written in the school newspaper. The principal judged an article, describing a student's experience with pregnancy, as inappropriate for younger students. He also objected to another article that presented the views of an identified student about her divorced parents because the article

did not give the parents an opportunity to respond to their daughter's remarks or to consent to their publication.

Compared with *Tinker* and *Fraser*, the opinion in *Hazelwood* presents a further development in the capacity of school officials to control student speech and expression. The majority ruled that public schools do not possess all of the attributes of streets, parks, and other traditional public forums that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." If the [school] facilities have [been reserved for] intended purposes, "communicative or otherwise," then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community (see 484 U.S., at 267). Moreover, a school must be able to set high standards for the student speech that is disseminated under its auspices--standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the "real" world -- and may refuse to disseminate student speech that does not meet those standards.

II

Early commentaries on *Fraser* and *Hazelwood* questioned parts of their rationale and predicted that the broad range of authority that these decisions delegated to school officials will raise issues. Siegel (1987), for example, argues that in *Fraser* the Court based its decision on a false dichotomy between "political communication"--the speech in *Tinker*--and "sexually oriented speech"--the speech in *Fraser*. Siegel insists that, although it contained sexual metaphor, the speech in *Fraser* was indeed political in its nature.

About the applications of the *Hazelwood* ruling Morris (1988) points out:

> In [the] school-sponsored curricular context, educators, the Supreme Court suggested in a broad dictum, can censor student expression in order to secure each of three goals: "[1] that participants learn whatever lessons the activity is designed to teach, [2] that readers and listeners are not exposed to materials that may be inappropriate for their level of maturity, and [3] that the views of the individual speaker are not erroneously attributed to the school." ... The first reason is unexceptional so long as it is achieved through the use of professional pedagogical techniques. . . . The other two goals are questionable and raise problems. (p. 10)

Regarding the school curriculum itself, Morris maintains that topics about AIDS, birth control, teenage pregnancy, and other

areas that produce staggering problems for society, "are precisely the [topics] that school newspapers ought responsibly to address" (p. 11). He finds that it is inconsistent with a legitimate pedagogical concern to censor the above subject areas just because "a uniquely sensitive, [and presumably small], student group does exist [within the larger student body]" (ibid.). Agreeing with the views of the dissenting Justices of the *Hazelwood* Court, Morris also contends that under the pretense of dissociating the school from a student point of view or expression some school district can probably censor student substantive views for public-relations purposes.[1] He predicts that such purposes, being noneducational and thus outside *Hazelwood*'s legal protection, will generate further litigation (ibid.).

In agreement with Morris's prediction is Gill's (1991) portrayal of *Fraser* and *Hazelwood* rulings as ambiguous. The ambiguity, she points out, becomes evident in the wide latitude of interpretations that state and lower federal courts are giving to the two decisions. Gill claims that this is a result of the decisions' failure: (1) to establish the precise impact on *Tinker*, (2) to address expression not "promoted" by the school, (3) to determine whether the *Tinker* ruling was limited to high schools, and (4) to define limitations on the discretion of the school officials.

Besides the legal uncertainty that *Fraser* and *Hazelwood* have introduced, analysts also see these decisions as articulating roles for educators and students that are incompatible with the mission of the public school to educate the citizens of the free, democratic, society. Characteristically, Russo (1989) remarks that students are now "deprived from actively participating, as either effective communicators or critically-thinking audiences, in their own education" (p. 21). Eveslage (1992) asserts that in *Fraser* and *Hazelwood* the Supreme Court "has shifted the First Amendment focus from the individual applying societal values to the authorities instilling institutional values" (p. 19). In these two cases, Eveslage claims, the Court has "focused on the role and function of administrators as school officials within an

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[1]In 1995, for example, a CD-ROM from Voyager Co. entitled "Who Built America," came under fire for three gay-related references and one to abortion. The CD-ROM was part of a software package distributed to schools that bought Apple computers. Voyager refused to edit this award-winning CD-ROM and Apple said it had not yet made a final decision about whether to include it in the future in packages for schools (see "Cybercurriculum: Why Voyager's Revisionist CD-ROM Was Almost History," by Valerie Burger, in *The Village Voice*, Issue of August 15, 1995).

educational institution, not, as it had in prior years, on students in a free society and administrators as public officials serving a democratic society" (p. 24).

In the aftermath of *Fraser* and *Hazelwood*, several educational disputes, which were resolved in district and federal courts, have illustrated the above issues. By reviewing the most important of these cases, McCarthy (1993) finds that after *Fraser* and *Hazelwood* laws which govern student speech and expression rights suggest a decline of constitutional protection for the free exchange of ideas in public education. "Currently," she points out, "the federal Equal Access Act affords greater protection to student expression than does the first amendment" (p. 497).[2] "But reliance on legislative action to protect the exchange of views in public schools," McCarthy warrants, "seems to negate a fundamental principle of our constitutional system that certain rights, such as freedom of speech, are beyond the will of majority" (ibid.).[3]

Not long after the Equal Access Act was passed, its effects became a distressing predicament not only for judges but also for educators and students and their parents. Many recent cases show that *Fraser* and *Hazelwood* have already gone beyond mere regulation of student speech and expression. The two rulings are now affecting issues such as student dress codes and religious activities and this has become a new source for disputes over school policy.

III

To construct their arguments according to the High Court's rulings, federal and district court judges are currently interpreting *Tinker*, *Fraser*, and *Hazelwood* as governing distinct forms of student speech or expression. This approach is best illustrated in *Chandler v. McMinnville School District* (1992) where the Ninth Circuit Court of Appeals found that speech or expression that is indecent is governed by *Fraser*, school-sponsored by *Hazelwood*, and all other by *Tinker*. However, what characterizes each decision are not so much the facts of the

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[2]The federal Equal Access Act states that if a federally assisted high school creates a forum for noncurriculum student groups to meet during noninstructional time, access to that forum cannot be denied based on the content of the meetings.

[3]Six states -- Arkansas, California, Colorado, Iowa, Kansas and Massachusetts -- have passed their own student freedom of expression bills, giving students broader rights than the *Hazelwood* decision allowed them.

specific student speech as what the Court majority in each case identified for being the ends and means of public education. In reality, each of the three decisions emphasizes fundamentally different notions about these ends and means, and this has become a source of controversy over policy decisions at the school level.

The *Tinker* Court stipulated that the mission of schools be to teach citizenship skills through experiences that resemble those of the real world. Accordingly, the best way for educators to teach about democratic government is by following the letter of the Constitution (393 U.S., at 507). In sharp contrast to this approach was what the Court advised in *Fraser*. There the majority argued that schools must teach "the habits and manners of civility" by having school officials indicate clearly to the students what "the boundaries of socially appropriate behavior" are (478 U.S., at 681). Finally, after *Hazelwood*, school authorities not only could limit expression that crosses "the boundaries of socially appropriate behavior" but also any speech that, during a school-sponsored activity, they would find inconsistent with the school's educational mission. According to the majority in this case, the best way for a school to accomplish its mission is to dissociate itself from, and limit whenever necessary, the activities that school officials find educationally inappropriate for their students.

Recent cases show that partitioning student speech according to the facts of *Tinker*, *Fraser*, and *Hazelwood* has not resolved the ambiguity of the last two Supreme Court decisions. Moreover, these recent cases suggest that the *Fraser* and *Hazelwood* have gone beyond mere regulation of student speech and expression. *Fraser* and *Hazelwood* are now affecting issues such as student dress codes and religious activities. In the future, the ambiguity of *Fraser* and *Hazelwood* may continue to be a source for new disputes over school policy owing to: (1) the different notions about the ends and means of public education, which all three decisions introduce; (2) the potentially broad applicability of *Fraser* and *Hazelwood* over educational disputes -- i.e., disputes other than just student speech; (3) the introduction of state and federal legislation to ease tensions that (1) and (2) may generate; and (4) federal and state courts resolving new disputes that pose confusing questions. The remaining of this section discusses three cases that represent the problem. The cases are *Pyle v. South Hadley School Committee* (1995) (*Pyle*), *Bivens v. Albuquerque Public Schools* (1995) (*Bivens*), and *Settle v. Dickson County School* (1995) (*Settle*).

Pyle arose from the claim of two high school students that their First Amendment rights were violated when school officials prohibited them from wearing on school premises two T-shirts emblazoned with the messages: "Coed Naked Band: Do It To The Rhythm" and "See Dick Drink. See Dick Drive. See Dick Die. Don't Be A Dick." The officials acted according to the anti-vulgarity provision of a school's dress code which read: "students . . . are not to wear clothing that . . . has comments or designs that are obscene, lewd or vulgar." The two students argued that a Massachusetts statute was giving students overall broader rights than the *Fraser* or *Hazelwood* decisions allowed them. Accordingly, school authorities could prohibit only student speech that would substantially and materially disrupt the basic educational mission of the schools.

The District Court found that the state's law primarily aimed at the *Hazelwood* decision, not the *Fraser*, and that the school's dress code provision against obscene, profane, lewd or vulgar apparel did not violate the First Amendment rights of the students (861 F. Supp.). Following an appeal from the students, however, the Court of Appeals certified on its own motion an issue of state law and posed the Supreme Judicial Court of Massachusetts with the question: "Do high school students in public schools have the freedom under M. G. L. c. 71, @ 82 to engage in non-school-sponsored expression that may reasonably be considered vulgar, but causes no disruption or disorder?" (55 F.3d, at 22).

Bivens is also about a school dress code. In 1993, after many warnings from the administrators, a ninth grade student was suspended from school because he was wearing sagging pants. Wearing of sagging pants was a violation of a dress code which was adopted by the school in response to a gang problem but the student denied that he was a gang member. Regarding his first amendment rights, the student argued that he was wearing sagging pants as a statement of his identity as a black youth and as a way for him to express his link with black culture and the styles of black urban youth (see 899 F. Supp. 556). The student's mother filed a complaint on his behalf and she alleged the school authorities that, among other violations, they breached the student's First Amendment right to freedom of speech, expression and association.

In a summary judgment the district court dismissed the case. About the plaintiff's claim that his First Amendment rights were violated, the court found that, although a form of speech neither vulgar or obscene (thus not restricted by *Fraser*) nor bearing the imprimatur of the school (thus not regulated by *Hazelwood*), the

wearing of sagging pants did not fall under the protection of *Tinker*. More specifically, the court argued that this form of speech was not constitutionally protected under the First Amendment because its supposedly conveyed message was not apparent to those who would be exposed to it.[4]

The facts in *Settle* are different from those of the above two cases. In 1991, a junior high public school teacher in Dickson, Tennessee, refused to accept from a student a research paper entitled "The Life of Jesus Christ" because the topic, as well the process of its selection, did not fulfil the assignment requirements. Upon the student's failure to write on another topic the teacher gave the student a "zero" grade. The student argued before the district court that the teacher's rejection of the topic restricted her rights of free speech under the First Amendment. The district court granted summary judgment for the defendants and dismissed the case. The student appealed the district court's decision but the Sixth Circuit affirmed the lower court's judgment.

Counting on *Hazelwood* the Court of Appeals stated:

> Where learning is the focus, as in the classroom, student speech may be even more circumscribed than in the school newspaper or other open forum. So long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere. (53 F.3d, at 155)

Nevertheless, besides *Hazelwood*, the court also mentioned the *Tinker* case, on which the plaintiff's lawyers mainly relied. In this reference the Court of Appeals maintained that the *Tinker* ruling supported the conclusion that teachers have broad discretion in limiting speech when they are engaged in administering the curriculum.

On September 25, 1995, the student's lawyers filed a petition for certiorari in which they presented the questions:

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[4]Even before the *Pyle* and *Bivens* decisions, school districts across the Nation started to permit individual school principals to decide jointly with teachers and parents whether or not to encourage students to wear uniforms. In 1995, the State of Washington passed a youth crime bill authorizing school districts to create magnet schools that use mandatory uniforms and stricter discipline as attractions. Parents would volunteer to send their children to these schools and, thus, the issue of student rights could be avoided. However, students coming off disciplinary actions or expulsions will be required to attend these schools as a condition for readmission. On February 24, 1996, President Clinton announced that he had ordered the Education Department to send a school uniform manual to the 16,000 school districts.

(1) May public school officials, consistent with First Amendment, punish or penalize student expression in individual written work on basis of a religious viewpoint expressed by student? (2) May disputed issues of motivation, intent, or pretext be resolved on summary judgment? On November 27, 1995, the Supreme Court denied the petition for writ of certiorari (116 S. Ct. 518).

CONCLUSIONS

If we try to evaluate the constitutional protection of student speech according to the categories which the three decisions devise, we inevitably arrive at the conclusion that after *Hazelwood* school officials can censor almost any kind of speech or expression during school hours. All it takes now is the expert judgment of an educator that the speech is inappropriate for students. In fact, there may be very little left today, besides decent student dress and insignia, to be governed by *Tinker* in public schools.

One primary consequence of the *Hazelwood* ruling was that it produced a wide division between administrators and journalism teachers (Shoop 1990, 579). Like Day and Butler (1988), many argued that *Hazelwood* restored faith in school officials who should be accorded deference in their educational policy formulation and implementation. Others, however, disagreed. Goodman (1988) found that "[j]ournalism educators were offended by [*Hazelwood*] because they know that protecting students' editorial freedom is the best method for teaching them journalism skills and the corresponding responsibilities that make the subject so valuable" (p. 41).

Taking the middle road, more recent commentaries suggest that the Court's recognition of the discretionary authority wielded by school officials does not necessarily have to result in administrative authoritarianism. In fact this authority could become an opportunity for educators and the community to use for advancing the real educational interests of students (Whitson, 1993). Perhaps this later settlement would not be so difficult to envision if *Fraser* and *Hazelwood* had been strictly used to address questions about administrative policy. On the other hand, the applicability of the two decisions to a broad range of disputes concerning curricular decisions, has prepared the terrain for further turmoil.

During hearings before the Senate Judiciary Committee, in the Fall of 1995, citizens and representatives of special interest groups argued for and against an amendment to the Constitution that would provide the religious freedom of public

school students with additional protection.[5] The amendment backed by some religious groups states, ". . . neither the United States nor any state shall deny benefits to or otherwise discriminate against any persons, acting in a private capacity, on account of their religious expression, belief, or identity; and the exercise by such persons of freedom of religion, speech, press or association shall not be construed as an establishment of religion" (see Federal Document Clearing House Congressional Testimony, October 20, 1995, and Federal News Service, September 29, 1995). On January 10, 1996, a United States Fifth Circuit Court of Appeals panel ruled that a Mississippi law requiring public schools to allow students to lead daily prayer is unconstitutional. However, the judges stated that students have prayer rights.[6]

Conceivably, this controversy is another symptom of the High Court's disposition to review educational disputes under the guise that the traditional role of schools is to serve a compelling governmental interest: provide the public with civic education. This compelling interest is balanced by the Justices against the interest of students to specific liberties. There is little doubt that schools should prepare students for becoming the members of a civil community. However, it creates problems to build into the rights of students -- such as freedom of expression -- the interest of the state. Specifically, by assuming that student rights cannot exist independently of the state's interests, one might infer that the liberties which the Constitution protects are not worthwhile in themselves.

Regarding school policy, the issue of how to balance the interests of students in constitutionally protected rights against the interest of the states to educate the citizens may not even exist. To paraphrase Justice Brennan in *New Jersey v. T.L.O.* (1985), public school officials have no legitimate interest in censoring student speech or expression in a way that unduly intrudes on the constitutional rights of students (469 U.S., at 364, n.5, Justice Brennan, with whom Justice Marshall joins, concurring in part and dissenting in part). Thus, the true issue is a question about how to strike a balance between conflicting conceptions of constitutionally legitimate means of

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[5]In an effort to show that a Constitutional amendment is not needed to guarantee freedom of religion, in July, 1995, President Clinton attempted to clarify existing law on religious expression in public schools. Among others he stated that students have the right to pray individually and in groups and discuss religious topics with their peers, as long as these activities do not compel other students to participate.

[6]See *Ingebretsen v. Jackson Public School District.*

carrying out the educator's responsibility to prepare tomorrow's citizens. To find the answer, school policy makers need to focus more on those teacher and student roles that are compatible with the educationally sound methods the schools should be using to educate the members of the democratic society.

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